UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Daphene Grassi, Charging Party, Daphene Grassi, Intervenor, v. Country Manor Apartments, Gail Rucks, Hollis Helgeson and H.H.H., Incorporated, Respondents.

HUDALJ 05-98-1649-8
Decided: September 20, 2001

Todd A. Kelm, Esq.
Matthew W. Brune, Esq.
For the Respondent

Karla A. Krueger, Esq.
Doug Clark, Esq.
For the Intervenor

Elizabeth Crowder, Esq.
Kathleen A. Szybist, Esq.
Joseph A. Pelletier, Esq.
Barbara J. Elkins, Esq.
Linda M. Cruciani, Esq.
For the Secretary

Before: William C. Cregar
Acting Chief Administrative Law Judge

INITIAL DECISION AND ORDER

This matter arose as a result of a Determination of Reasonable Cause and Charge of Discrimination ("Charge") issued on November 21, 2000, by the Department of Housing and Urban Development ("HUD") on behalf of Daphene Grassi ("Intervenor"). The Charge alleges that Respondents Country Manor Apartments ("Country Manor"), Gail Rucks, Hollis Helgeson, and H.H.H., Incorporated ("HHH, Inc.") discriminated against Ms. Grassi on the basis of her handicap in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601, *et seq*. ("the Act").

More specifically, the Charge alleges that Respondents discriminated against Ms. Grassi in the terms and conditions of rental by requiring her to purchase liability insurance as a condition of continuing to operate a motorized wheelchair at Country Manor, thereby violating Section 804(f) of the Act. 42 U.S.C. § 3604(f). On December 19, 2000, I granted Ms. Grassi's Motion to Intervene. Respondents answered the Charge on December 20, 2000. A hearing was held on March 20-21, 2001 in Sartell, Minnesota. Post-hearing briefs were filed on May 18, 2001. On July 19, 2001, I extended the date for the issuance of an initial decision for an additional 60 days. *See* 24 C.F.R. § 180.670(b).

Based upon the record, including my observation of the witnesses and their demeanor, and my evaluation of the evidence, I conclude that Respondents violated Section 3604(f) of the Act and, accordingly, I award damages and assess a civil money penalty against Respondents.

Findings of Fact

1. Country Manor Apartments is a 25-acre housing facility located in Sartell, Minnesota. It includes a 172-bed nursing home, 45 "assisted living" units, and 155 "senior apartments," altogether housing approximately 396 people. The units are connected by a network of corridors permitting the residents to move freely about to visit other residents and the various amenities. These amenities include a convenience store, pharmacy, bank, beauty shop, chapel, recreation and community rooms, congregate

dining facility, and a home care agency that provides skilled nursing services. J.Exs. 6, 8, 11, 13; Tr. pp. 127-28, 195-97.[1]

2. Residents may participate in various activities including social gatherings, educational activities, and health services. These activities take place in the recreation halls, community rooms, dining hall, and other places throughout the facility. J. Ex. 6; Tr. pp. 196-97.

3. The connecting corridors vary in width from five to six feet. There are numerous 90-degree turns and wheelchair ramps. Residents frequently travel 100 to 300 yards to reach their destination. J. Exs. 8, 15; Tr. pp. 137-40.

4. Country Manor provides "escort service" (a home health aid, staff member, or volunteer to push a tenant's wheelchair) to any destination on the campus. The service can be "prescheduled," "on-call,"(via a call button or pendant) or "a la carte." Both the "prescheduled," and "on-call" services are prepaid. One available package is "Assisted Living Plus" that includes a variety of services, including unlimited use of the "escort service." "Assisted Living Plus" costs $700 per month. The "a la carte" service costs a minimum of $10 per trip. J. Ex. 13; Tr. pp. 338-40, 359, 366, 399-401, 408.

5. Three federal and/or state government programs may be available to pay some, or all of the "escort service" fees. Under any of these programs the tenant must be experiencing medical problems sufficiently severe to warrant placement in a nursing home. In addition, a tenant who does not meet the financial guidelines, i.e., can afford to pay for the services, is not eligible for assistance in paying the "escort service" fees. Tr. pp. 375-82.

6. Respondent HHH, Inc., owned and operated Country Manor until some time in 1999 when the property was purchased by The Foundation for Health Care Continuum, a subsidiary of The Long Term Care Foundation, a Tennessee Corporation ("Foundation"). Benedictine Health Systems, Inc. ("Benedictine") is the subsequent owner's property manager. Respondent Hollis Helgeson was the owner of H.H.H., Inc. Respondent Gail

[1]The following reference abbreviations are used in this decision: "Tr." followed by a page number for the transcript; "J.Ex." for Joint Exhibit; "C.P. Ex." for Charging Party's Exhibit; "I. Ex." For Intevenor Exhibit; "R. Ex." for Respondents' Exhibit, and "F.F." for finding of fact.

Rucks was and is the Director of Housing under both owners. As such she is responsible for the day-to-day operation of the housing units of the Country Manor campus. Brian Kelm was the Chief Executive Officer ("CEO") of H.H.H. and is now the Chief Executive Officer of Benedictine. J. Exs. 10, 14; Tr. p. 99.

7. Intervenor Daphene Grassi has been a tenant at Country Manor since 1997. She suffers from degenerative disc disease that in 1983 resulted in a surgical fusion of her lower back. She suffers from diabetes which resulted in the amputation of two toes on her right foot. Because of these ailments she cannot stand or walk without the assistance of either a "walker" or another person. She has difficulty propelling a non-motorized wheelchair, and she is unable to propel a non-motorized wheelchair up a ramp. J.Ex. 7; Tr. pp. 28-29, 32-33, 38.

8. Prior to moving to Country Manor, Ms. Grassi lived in a single-family home in Dell City, Oklahoma. At that time she used a motorized wheelchair. In early 1997, she decided that she wanted to live closer to her daughter, Karen Braun, a resident of St. Cloud, Minnesota. During Country Manor's application process Ms. Braun informed Ms. Rucks that Ms. Grassi used an electric wheelchair to get from one place to another and that she would need to continue to use it to get around the Country Manor campus. Ms. Grassi's application informed Respondents that she suffered from multiple ailments including, " Diabetic, spinal fusion, two toes (right foot) amputated, insulin dependent." J. Ex. 7; Tr. pp. 25-26, 90-91, 225-26.

9. Ms. Grassi occupies a "senior apartment." She leaves her apartment several times each day to visit her friends and the various facilities available at Country Manor. She uses her electric wheelchair to make these visits. Throughout her residency at Country Manor her operation of the wheelchair has been safe and prudent. Tr. pp. 27, 38, 80-92.

10. Two documents establish the terms of the tenancy at the senior apartments. The first is entitled "Country Manor Rental Agreement," and the second, "Country Manor Policies." The "Country Manor Rental Agreement" contains the following provisions:

> 8. Your rental agreement with Country Manor Apartments may be modified or amended only upon 30 day advance notice which differs according to the reason for termination.
>
> 10. Country Manor Apartments has established a tenant complaint resolution process which is described in the policy handbook. We encourage you to feel free to talk to the staff at Country Manor Apartments about any questions and concerns that you may have.

I. Ex. 2. The "Country Manor Policies" contain the following provisions:

> Tenant Council
> Meetings will be established on a regular basis. The purpose of these meetings is to provide input as to the policies of the facility. Tenants are encouraged to attend these meetings.
>
> Complaint Resolution Process
>
> Country Manor Apartments recognizes that questions and complaints may arise from our tenants and families. It is our intent that we deal effectively with this area so all such situations can be resolved. The registration and disposition of complaints is carried out without threat of discharge or reprisal against the tenant or person filing the complaint. The complaints are to be directed to the director of housing. This individual that has been designated by the CEO for handling of the apartments.

I. Ex. 1.

11. Tenant Council meetings are scheduled on a regular basis ranging from bi-monthly to quarterly. The meetings, presided over by Country Manor management, are also referred to as a "Tenant Roundtable." At these meetings tenants are allowed to raise issues of concern to them and, in some cases, are allowed a vote. In the event a majority of the voting tenants oppose a proposed policy, Country Manor's management reviews the proposed policy, makes any revisions, and resubmits the revisions to the Tenant's Council. Written minutes are made of the meetings. J. Ex. 12, Tr. pp. 209-10, 239-40, 264-66.

12. Between 1995 and the end of 1997, Respondents received comments from tenants concerning the potential dangers posed by electric wheelchairs. These comments addressed their speed and weight, the lack of visibility around corridor corners, and being startled when unexpectedly approached from behind. Tr. 172-77.

13. A non-motorized wheelchair weighs approximately 30 or 40 pounds. A motorized wheelchair weighs between 150 and 200 pounds without an occupant and can travel approximately 4 to 5 miles per hour. Its costs range from $3,500 to $8,000. Approximately 60% of motorized wheelchair owners use Medicare or Medicaid funds for their purchase. I. Ex. 7; Tr. pp. 69, 86,274, 318-19, 400.

14. From January through April 1998, Country Manor's management held discussions with their insurance agent, Bob Mahowald. These discussions resulted in their decision, implemented May 1, 1998, to require each motorized wheelchair operator to obtain liability insurance within 30 days. On April 27, 1998, Country Manor's management sent a letter to all tenants. In relevant part it states:

> A tenant who owns and/or operates an electric scooter/wheelchair is responsible for having a personal liability insurance policy. This policy is necessary in case of injury to self or another person by the tenant operating the scooter/wheelchair. Proof of the policy must be provided to the Apartment office on an annual basis. Tenants who have a Renters(sic) Insurance Policy may have this liability coverage already included in their policy. New tenants or tenants who purchase an electric scooter/wheelchair must provide proof of insurance coverage to the office within 30 days. Electric scooters/wheelchairs must be operated on **low speed** throughout the hallways at **all times**. Scooters/wheelchairs must be kept in the apartment, not parked or left unattended in the hallway.

J. Ex. 1. (Emphasis in original).

15. Despite being described by Ms. Rucks as "the biggest event" in her 28 year employment, Country Manor management imposed the "insurance policy" without 1) consultation with the tenants at Tenant Council meetings, 2) research into the likelihood of accidents and injuries resulting from electric wheelchairs, or 3) any effort to compare any risk associated with motorized wheelchairs with other risks (such as the risk of fire from cooking appliances). Tr. pp. 238-42.

16. Prior to April 27, 1998, there had been no accidents or injuries involving the use of an electric wheelchair at the Country Manor campus. J. Ex. 16; Tr. 235.

17. Ms. Grassi considered the April 27, 1998, letter as an "insult to her intelligence." She believed herself fully capable of making her own decision to purchase, or not purchase, liability insurance. She contacted an attorney, Karla Krueger. On June 3, 1998, Ms. Krueger wrote to Country Manor management stating her opinion that the liability purchase requirement violated the Fair Housing Act and that she would defend any action taken to force Ms. Grassi to comply. J. Ex. 2; Tr. pp. 44, 48.

18. Following her receipt of a copy of Ms. Krueger's letter, Ms. Grassi requested Ms. Rucks to place the subject of motorized wheelchairs on the agenda of the next Tenant Council meeting. Country Manor management denied her request and did not permit discussion of the policy at the next meeting. After her request was denied, Ms. Grassi posted a copy of Ms. Krueger's letter on the community bulletin board in the dining

room. Ms. Rucks removed the letter shortly thereafter.[2] Ms. Rucks also approached her on several occasions regarding her refusal to purchase liability insurance. One incident, in particular, occurred in the dining room during a conversation Ms Grassi had been having with two other residents. On that occasion Ms. Rucks stated, "You *will* buy insurance." Tr. pp. 49-53.

19. On June 26, 1998, Respondents' legal counsel responded to Ms. Krueger's letter by denying that the wheelchair policy violated the Fair Housing Act. On September 25, 1998, Ms. Grassi filed a complaint of discrimination based on handicap with the Department of Housing and Urban Development. The complaint alleges that the liability insurance requirement subjected her to different terms and conditions and privileges in her tenancy than other tenants because of her handicap. J.Exs. 3, 4.

20. Of the 30 tenants to whom the new insurance policy applied, 29 provided proof that they had purchased personal liability insurance. Only Ms. Grassi did not. Tr. p.140.

21. On March 20, 2000, roughly two years after the insurance purchase requirement was imposed, an accident involving a motorized wheelchair did occur at Country Manor. The accident occurred because the operator of the motorized wheelchair used his horn to warn the pedestrians ahead of him. The noise startled one of the pedestrians, who stumbled into another pedestrian, causing them both to fall. The second pedestrian suffered a broken leg that necessitated several months' treatment in a nursing home and subsequent occasional use of a wheelchair. The wheelchair did not actually come in contact with either pedestrian. Tr. pp. 440-442, 449-50.

22. Following this incident Country Manor management, for the first time, scheduled a Tenant Council meeting for April 6, 2000, to discuss the subject of motorized wheelchairs. All motorized wheelchair operators were required to attend. Approximately 75 tenants attended. The management began the meeting by reading the May 1998 policy requiring motorized wheelchair operators to purchase liability insurance. Management stated that only one person had refused to purchase the insurance. Ms. Grassi, who was in attendance, was embarrassed because it was common knowledge that she was the sole holdout. Several tenants made suggestions as to how to improve safety. These included installing mirrors at corridor intersections, giving pedestrians the right of way, and

[2]Ms. Rucks did not recall who removed the letter, but concedes that she "might have." Tr. pp. 249-250. I do not credit her statement that she did not recall who took the letter down. The liability insurance issue must have been a "hot topic" at Country Manor. Indeed, Ms. Rucks stated that it was the most important issue that she had addressed in 28 years. Ms. Rucks would have remembered removing a letter that not only challenged Country Manor's policy but claimed that it was illegal.

prohibiting passing of pedestrians by motorized wheelchairs. No comments were made about the liability insurance purchasing requirement. No vote was taken regarding the policy. J. Exs. 11, 12; Tr. pp. 59-61, 289-95.

23. On July 10, 2000, Ms. Rucks wrote HUD stating that the tenants "fully endorsed the policy." I. Ex. 6.

24. Subsequent to the April 6th Tenant's Council meeting, Country Manor management installed mirrors at the intersections of corridors. It has also instituted a requirement that motorized wheelchairs be operated at a low speed setting. Thirty Country Manor tenants use motorized wheelchairs. Three of these operators disobey the rule against speeding. Ms. Grassi is not one of them. Tr. pp. 282-83.

Discussion

Additional Respondents

The Charge of Discrimination issued on November 21, 2000, does not name Foundation, Benedictine, and Brian Kelm ("additional parties") as respondents. Neither the Secretary nor the Intervenor moved to amend the Charge of Discrimination to add the additional parties as respondents prior to the filing of post-hearing briefs. The Intervenor, in her Post-Hearing Brief, requests, for the first time, an amendment to the pleadings to conform them to the evidence by adding the additional parties as respondents. *See* 24 C.F.R. §180.425(c). I deny the request.

This cited rule permits amendment of pleadings to conform to the evidence. It states:

> Conformance to the evidence. When issues not raised by the pleadings are reasonably within the scope of the original charge or notice of proposed adverse action and have been tried by the express or implied consent of the parties, the issues shall be treated in all respects as if they had been raised in the pleadings, and amendments may be made as necessary to make the pleading conform to the *evidence*.

24 C.F.R. § 180.425(c). (emphasis added).

In their Answer and their February 22, 2001, "Certificate of Representation and Parties," Respondents' counsel identify themselves as "Attorneys for Respondents." They do not purport to represent any other persons or entities. The named Respondents are unable to consent to the jurisdiction of nonparties, specifically, Foundation,

Benedictine, and Brian Kelm. Furthermore, the addition of parties without providing these added parties an opportunity to defend themselves would violate the Due Process Clause of the United States Constitution. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466 (2000). Thus, this omission cannot be cured by a belated request to conform a pleading to the evidence pursuant to the HUD regulation.

Accordingly, I deny Intervenor's request to add Brian Kelm, Benedictine, and Foundation as additional respondents in this action, pursuant to 24 C.F.R. §180.425(b).

Direct Evidence

Direct evidence of discrimination, if it constitutes a preponderance of the evidence as a whole, is sufficient to support a finding of discrimination.[3] *See, e.g., Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990); *HUD v. Jerrard*, 2A Fair Housing-Fair Lending Rptr. (Aspen) ¶25,005, 25,087 (HUDALJ 1990). A policy that explicitly subjects a protected class to treatment differing from that of non-members of the protected class is facially discriminatory. *Bangertner v. Orem City Corp.*, 46 F.3d 1491, 1500-01 (10th Cir. 1995). To be "explicit," the language of the policy need not specifically identify the mobility impaired tenants if it is clear from the language that they are targeted by the policy.[4] *United States v. M. Westland Co.*, 3 Fair Housing-Fair Lending Rptr. (Aspen) ¶15,941, 15,941.3. (C.D. Cal. 1994).

The Act defines a disability as a "physical or mental impairment which substantially limits one or more of . . .[a]. . .person's major life activities. 42 U.S.C. § 3602(h)(1). Walking is a "major life activity." *Anderson v. North Dakota State Hosp.*, 232 F.3d 634, 636 (8th Cir. 2000). A substantial limitation exists when a person "is unable to perform . . . or . . .[is] significantly restricted as to the condition, manner, or

[3] Unlawful discrimination may also be proved by the *McDonnell Douglas* three part disparate treatment analysis or by an analysis under the "disparate impact" test. *See e.g., Secretary of HUD v. Blackwell*, 2 Fair Housing-Fair Lending (Aspen) ¶ 25,001, 25011 (HUD ALJ 1989), *aff'd* 908 F.2d 864 (11th Cir. 1990); *Mountain Side Mobile Estates v. Secretary of HUD*, 56 F.3d 1243, 1250 (10th Cir. 1995). The *McDonnell Douglas* scheme is a recognition that direct proof of unlawful discrimination is often difficult to obtain. It permits a plaintiff to make an initial showing, indirect in nature, that raises a presumption of discrimination. Because I have determined that discrimination exists in this case due to a facially discriminatory policy, I do not address whether or not discrmination has been proved by these other analytical schemes. *See, e.g., Pinchback*, 689 F.Supp. at 1452 ("Because she proved purposeful discrimination directly, . . . the *McDonnell Douglas* method of proof is irrelevant."). *See also Trans World Airlines v. Thurston*, 469 U.S. 111 (1985) ("The *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination.").

[4] The discriminatory intent need not be "hostile." The discriminatory intent can also result from a paternalistic, "we know best," attitude resulting from stereotyping of the handicapped and/or elderly. *See U.S. v. Scott*, 788 F. Supp. 1555, 1562 (D. Kan. 1992).

duration in which [the] individual can perform a major life activity . . . ." *Id., citing* 29 C.F.R. § 1630.2(j)(l). Ms. Grassi's degenerative disc disease and the loss of two toes on her right foot prevent her from standing or walking without the assistance of either a "walker" or another person. In addition, she is unable to propel a non-motorized wheelchair up a ramp and has difficulty propelling a non-motorized wheelchair even on a level surface. F.F. 7. Accordingly, she has a "physical impairment which substantially limits a major life activity" and, thus, she is a person with a disability within the meaning of the Fair Housing Act and, therefore, is a member of a protected class.

Ms. Grassi is a member of the class of severely mobility impaired persons who, because of her impairment, must use a motorized wheelchair for the purpose of walking, a major life activity. Respondents' explicit policy of requiring operators of motorized wheelchairs to obtain liability insurance applies, on its face, to persons who are severely mobility impaired while exempting non-mobility impaired persons, e.g., those who can walk, and less severely mobility impaired persons, e.g., those who can use self-propelled wheelchairs.[5] Accordingly, Complainants have established that Respondents' policy directly discriminates against Ms. Grassi.

---

[5]Respondents provided anecdotal evidence that some tenants use motorized wheelchairs as a convenience to get from one part of the campus to another. However, the record establishes that even these tenants are only able to walk short distances and need the motorized wheelchairs to travel the relatively long distance from their residence to the dining hall or other facility. Tr. pp. 107-09, 183, 187, 292, 335-37, 438. No quantitative or outside evidence was presented supporting a conclusion that the class of motorized wheelchair users includes those who are not disabled under the meaning of the Act and who thus purchase such wheelchairs for convenience rather than need. Evidence was submitted, however, that these wheelchairs cost between $3,500 and $8,000 to purchase, that 60 percent of those who purchase such wheelchairs do so with government funding, and that medical documentation of need is required to receive government funding for such purchase. Therefore, it defies reasonable belief to conclude that people own and use these conveyances for mere convenience, rather than because they have some impairment of their ability to walk. Statistical evidence was submitted by HUD which was opposed on the basis of lack of timeliness. I have not considered that evidence in making this decision, so I do not rule on the timeliness issue either.

Respondents' Attempted Justification

Because Respondents' policy discriminates against persons with disabilities, Respondents must articulate a legitimate justification for their policy to overcome the case against them. *Bangertner*, 46 F.3d at 1501; *U.S. v. Badgett*, 976 F.2d 1179 (9th Cir. 1992). In making that showing, Respondents must establish that there is a compelling business necessity for the policy and that they have used the "least restrictive means" to achieve that end. *Fair Housing Counsel v. Ayres*, 3 Fair Housing-Fair Lending (Aspen) ¶ 15,931 (C.D. Cal. 1994).

Respondents attempt to justify their policy of requiring Ms. Grassi to obtain liability insurance for her motorized wheelchair on the theory that they have an obligation to protect residents' health and safety. They argue that the policy promotes the health and safety of the residents by assuring that resources are available to pay for medical treatment of a resident in the event of an injury caused by a motorized wheelchair.[6] They also assert that Ms. Grassi could avoid the problem altogether by no longer using her motorized wheelchair and, instead, by purchasing services such as "Assisted Living Plus" or the "a la carte" plan. These justifications lack merit.

First, although Respondents may have an interest in the health and safety of the residents of Country Manor, they have not established that requiring residents to have sufficient resources available to compensate accident victims, as opposed to taking direct steps to alleviate safety concerns, promotes health and safety. The Charging Party and Intervenor have raised no quarrel with the actions taken by Respondents that have been directly responsive to safety concerns. These actions include installing mirrors at hall intersections and requiring motorized wheelchairs to be operated at low speed. F.F. 24. However, unlike these actions, any connection between a requirement to obtain liability insurance and the promotion of health and safety is tenuous at best.[7] As Mr. Mahowald testified, "Liability insurance does not prevent accidents, period."[8] Tr. p. 308.

[6]Respondents also initially contended that they were attempting to limit their own liability in the event of an accident. Tr. pp. 161-62. However, their own insurance agent Mr. Mahowald, testified that Respondents could not be held liable in the case where a resident was injured by another resident in a motorized wheelchair incident barring their own negligence. Tr. p. 298. Accordingly, I conclude that the circumstances under which Respondents could be held liable due to an accident involving motorized wheelchairs are too remote to provide a legitimate business justification.

[7]Respondents rely upon *United States v. Hillhaven Corp*., 960 F. Supp. 259 (D. Utah 1977). In that case the United States District Court upheld rules restricting the use of motorized carts in common areas during certain particularly-crowded times of the day, finding that the housing provider had a legitimate nondiscriminatory interest in protecting the safety of its elderly residents. Respondents' reliance is misplaced. First, the imposition of a liability insurance requirement, unlike the placement of mirrors, and the requirements to avoid specific areas at

Second, Respondents have not established an empirical basis to conclude that operators of motorized wheelchairs pose a substantial risk of harm to themselves or others. Respondents implemented the policy without obtaining data suggesting that the operators of motorized wheelchairs posed the type of risk that required a special solution. Mr. Mahowald testified that he made the recommendation based solely upon his ability to assess risk. Tr. p. 322. Respondents obtained no statistical analyses that might have established the probability of accidents resulting from motorized wheelchair use, for example. They did not consult experts or the managers of similar facilities to learn if these appliances really pose a safety problem. Indeed, there had been no accidents at Country Manor involving motorized vehicles in the years prior to implementation of the policy. The accident involving a motorized wheelchair following the implementation of the policy would not have been prevented or even ameliorated by liability insurance coverage.

Third, the implementation of the policy without supporting data reflects an underlying assumption that motorized wheelchair operators, as a class, pose a unique risk to the safety and health of other tenants. This amounts to improper stereotyping, a practice that has been rejected in several fair housing cases. *See, e.g., HUD v. Cloclasure*, 2A Fair Housing-Fair Lending (Aspen) ¶ 25,134, 26,109 (HUD ALJ 1998) (it

---

certain times, or for low speed operation, does not tend to prevent accidents or promote safety. Second, unlike the blanket requirement to obtain liability insurance, the *Hillhaven* restrictions could be, and were, modified where necessary to accommodate a person's particular disability.

[8]Indeed, the one accident that occurred on the premises, in 2000, illustrates the emptiness of this justification. There is no evidence that operator was negligent; rather, it appears that he was using due care. Accordingly, it is very doubtful that there would have been a successful claim against the policy in this circumstance.

cannot be inferred from past damage caused by children that the children of future tenants will also cause damage). Improper stereotyping of persons with disabilities is reflected by Congress' intention to prohibit actions based upon overprotective assumptions. As the House Judiciary Committee noted, the Act "repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion." H.R. Rep. No. 711, 100th Cong., 2d Sess. 18 (1988). Legitimate safety and health considerations are a proper concern for a housing provider. However, any remedies must take into account the needs and abilities of individual tenants:

> Restrictions based on public safety cannot be based on blanket stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents. . . . Any special requirements placed on housing for the handicapped based on concerns for the protection for the disabled themselves or the community must be individualiz[ed]. . . and must have a necessary correlation to the actual abilities of the persons upon whom it is imposed.

Bangertner, supra at 1503-04 (internal citations omitted).[9]

The stereotyping and "we know best" attitude are also abundantly illustrated by the manner in which Respondents implemented the policy. Rather than following their own written rules, they held no meeting with the tenants to solicit their views until approximately two years after the policy was implemented. Ms. Grassi was not allowed to place the subject on the agenda at the next meeting of the Tenant Council, and the letter

[9]This is what Respondents did in the cases of residents who had trouble remembering to turn off their stoves, thus creating a fire hazard. Respondents did not implement a blanket ban on use of stoves. Rather, Respondents disconnected the stoves of those individuals with the memory difficulties. Tr. p. 157. Respondents also took additional safety measures throughout the complex, such as installing sprinklers. *Id*. They did not require those individuals with memory difficulties who use ovens or stoves to carry liability insurance. Tr. p. 152.

from her lawyer suggesting that the policy was discriminatory was removed from the bulletin board by Ms. Rucks.

Finally, Repondents' suggestion that Ms. Grassi could forego the essentially no-cost use of her motorized wheelchair, and instead, spend $700 per month or $10 per trip for alternative transportation is so expensive, inconvenient, and emotionally unsatisfactory that I do not view it as a serious alternative.[10] Ms. Grassi leaves her apartment daily, making anywhere from one to ten stops to different places throughout the Country Manor campus. She checks her mail, shops, and visits the dining room, bank, and neighbors. The escort service would require that she page someone to escort her, wait for the escort, and repeat these steps after each stop. Each call would cost at least $10 unless she bought the "Assisted Living Plus" plan, in which case she would pay $700 per month. Finally, these plans would also impose an emotional cost by increasing Ms. Grassi's dependence on others. It is a sad fact of life that as people age they become more dependent. Congress recognized this fact when passing the ADA. Ms. Grassi, a woman with a strong sense of independence who formerly lived on her own, would pay a significant emotional price by surrendering so much of her remaining independence.

REMEDIES

Emotional Distress

Ms. Grassi credibly testified that she felt demeaned by Respondents' requirement that she purchase personal liability insurance as a condition of operating her motorized wheelchair. She made several unsuccessful attempts to resolve this matter informally. She felt, "brushed aside" by Ms. Rucks' refusal to allow her to bring the matter up at the Tenant Council meeting. Ms. Rucks' removal of the letter Ms. Grassi had posted on the community bulletin board angered her. She was also angered by Ms. Rucks' attempts to persuade her to drop her complaint, particularly in the Dining Hall with its implied threat of eviction. She viewed the attempted co-opting of her daughter as another indication, like the requirement to purchase insurance itself, that she was no longer to be treated as an adult. On another occasion, Brian Kelm made a similar plea to dissuade her from her lawsuit, which Ms. Grassi found to be "very stressful, [a] very hard thing." Finally, the

[10] These postulated alternatives also violate the underlying premise of the Act, which is to enable disabled persons to function with autonomy and dignity as much as possible. "The Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self sufficiency for such individuals." Americans with Disabilities Act (ADA), 42 U.S.C. § 1210(a)(8). In addition, although Respondents assert that government funding is available for such services, as though that should make the cost of them irrelevant here, Appendix 1 of Intervenor's Post Hearing Brief shows that Ms. Grassi would not qualify for such government aid. Finally, because the policy discriminates against a class of persons with disabilities, it cannot be validated by the presence or absence of alternatives or accommodations.

public mention by Ms. Rucks at the Tenant Council meeting that only one person had refused to purchase the insurance policy singled Ms. Grassi out and embarrassed her in front of the approximately 75 attendees. J. Ex. 12; Tr. pp. 50-52, 59-61,63, 65, 289-95.

Intervenor has requested damages for emotional harm in the amount of $30,000. I consider the requested amount to be excessive. Although she justifiably felt anger and humiliation, she did not receive medical treatment for her distress, nor was she evicted or prohibited from using her wheelchair. Having considered the above circumstances, I award Ms. Grassi $7,500 for emotional harm.[11]

Civil Penalty

To vindicate the public interest and deter future violations of law, the Act authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. § 3612(g)(3); *see also* 24 C.F.R. § 180.671. In a proceeding involving two or more respondents who violate the Act, separate civil penalties may be assessed against each respondent. 24 C.F.R. § 180.671(e). Where, as here, Respondents have not been adjudged to have committed any prior discriminatory housing practice, a maximum penalty of $11,000 per Respondent may be assessed. 42 U.S.C. § 3612(g)(3)(A); *see also* 24 C.F.R. § 180.671(a)(1).

Determining an appropriate civil penalty requires consideration of various factors such as the "nature and circumstances of the violation, the degree of culpability, any history of prior violations, the financial circumstances of the Respondent, the goal of deterrence, and other matters as justice may require." *HUD v. Schmid*, 2A Fair Housing-Fair Lending Rptr. (Aspen) ¶ 25,139, 26,153 (HUDALJ 1999) (*quoting* H.R. Rep. No. 711, 100th Cong., 2d Sess. 37 (1988)); *HUD v. Johnson*, 2A Fair Housing-Fair Lending Rptr. (Aspen) ¶25,076, 25,711 (HUDALJ 1994); *see also* 24 C.F.R. § 180.671(c).

[11] *Cf. HUD v. Dutra*, 2A Fair Housing-Fair Lending (Aspen) ¶ 25,124, 26063 (HUD ALJ 1996) ($5,000 award for emotional and physical distress resulting from failure to waive no pet policy); *HUD v. Ocean Sands*, 2A Fair Housing-Fair Lending (Aspen) ¶ 25,061 (HUDALJ 1993) ($10,000 award for emotional distress resulting in part from the hostility of condominium association against complainant who requested accommodation for wheelchair); *HUD v. Dedham Housing Authority*, 2A Fair Housing-Fair Lending (Aspen) ¶ 25,015 (HUDALJ 1992) ($10,000 award for emotional distress for complainant with heart problems denied a parking space).

Nature and Circumstances of the Violation and Degree of Culpability

The nature and circumstances of Respondents' violation are of a sufficiently serious nature to warrant a civil penalty. They implemented a facially discriminatory policy, and in doing so, denied Ms. Grassi and 29 others an opportunity to criticize or even comment on the policy until two years after its implementation, in violation of their own written policies. Their cavalier treatment of Ms. Grassi, particularly by Ms. Rucks, needlessly inflicted emotional harm including fear of eviction, ostracism, and intimidation. Respondents' actions were their own, based upon their own initiative. However, Respondents did not act in a vacuum. They followed the recommendation of their insurance agent and obtained legal advice from a law firm. There is no evidence of dissent or disagreement among the various Respondents over the decision to implement the policy and to ignore the affected tenants in doing so. Accordingly, while Respondents are fully culpable, I have considered as mitigating circumstances the facts that they sought and followed what they considered to be the sound advice of professionals and that no action was taken to evict or restrict Ms. Grassi as a result of her failure to procure liability insurance.

Financial Circumstances

Respondents have neither claimed nor produced any evidence that they are unable to pay a civil money penalty. Respondents' financial circumstances, therefore, are not a factor in determining the civil money penalty to be assessed in this case.

Deterrence

Deterring other similarly situated housing providers from violating the Act is fostered by the imposition of a civil penalty in this case. In addition, a civil penalty will serve to prevent Respondents from committing further violations of the Act. Weighing the factors discussed above, I find that a civil penalty in the amount of $5,000 against Respondents Country Manor, Hollis Helgeson, and H.H.H., Inc., jointly and severally, is appropriate. In addition, I find that a civil penalty in the amount of $3,000 against Gail Rucks is appropriate

Injunctive Relief

An Administrative Law Judge may order injunctive or other equitable relief to make a complainant whole and to protect the public interest. 42 U.S.C. § 3612(g)(3). *HUD v. Las Vegas Housing Authority*, 2A Fair Housing-Fair Lending Rptr. (Aspen)

¶ 25,116, 26,011 (HUDALJ 1995); *HUD v. Krueger*, 2A Fair Housing-Fair Lending Rptr. (Aspen) ¶ 25,119, 26,028 (HUDALJ 1996); *HUD v. DiCosmo*, 2A Fair Housing-Fair Lending Rptr. (Aspen) ¶ 25,094, 25,851 (HUDALJ 1995). Injunctive relief is used to eliminate the effects of past discrimination, prevent future discrimination, and position the aggrieved person as closely as possible to the situation he or she would have been in but for the discrimination. *HUD v. Dutra*, 2A Fair Housing-Fair Lending Rptr. (Aspen) ¶ 25,124, 26,064 (HUDALJ 1996) (*citing Park View Heights Corp. v. City of Blackjack*, 605 F.2d 1033, 1036 (8th Cir. 1979), *cert denied*, 445 U.S. 905 (1980). Accordingly, I have ordered injunctive relief directing Gail Rucks to rescind the policy of requiring the operators of motorized wheelchairs to purchase liability insurance; enjoining Respondents from reinstituting that policy; enjoining Respondents from instituting policies that discriminate against persons with disabilities; prohibiting Respondents from retaliating against Ms. Grassi or any other individuals who testified or otherwise participated in this case; directing that copies of the final decision be sent to tenants and employees of Country Manor; and directing Country Manor's management to attend fair housing training that focuses on disability-related issues.

Because the present owner of Country Manor (Foundation), its management company (Benedictine), and its CEO (Brian Kelm) are not parties to this proceeding, they are not subject to this Order. Accordingly, to protect the public interest, I have required Ms. Rucks to inform the Secretary and Intervenor, in writing, of the steps taken to implement the Order and whether or not Foundation, Benedictine, and/or Brian Kelm have acted in any way to prevent Respondents from carrying out this Order.

ORDER

It is hereby ORDERED that:

1. Respondent Gail Rucks rescind the policy requiring the purchase of liability insurance by operators of motorized wheelchairs residing at Country Manor.

2. Respondents are permanently enjoined from reinstituting their policy requiring the purchase of liability insurance by operators of motorized wheelchairs residing at Country Manor.

3. Respondents are permanently enjoined from discriminating with respect to housing against persons with disabilities.

.

4. Within forty-five (45) days of the date this Order becomes final, or as soon thereafter as HUD and Respondents can arrange, Respondent Gail Rucks and Country

Manor Apartments managerial agents and employees shall attend fair housing training, focusing on disability issues, approved in advance by HUD.

6. Within forty-five (45) days of the date this Order becomes final, Respondents shall pay damages in the amount of $7,500 to Intervenor Daphene Grassi. Respondents' liablility to pay this amount is joint and several.

7. Within forty-five (45) days of the date this Order becomes final, Respondents shall pay a civil penalty in the amount of $5,000 to the Secretary of HUD. Respondents' liablility to pay this amount shall be joint and several.

8. Within forty-five (45) days of the date this Order becomes final, Respondent, Gail Rucks shall pay a civil penalty in the amount of $3,000 to the Secretary of HUD or have made arrangements for a payment plan.

9. Respondents are enjoined from taking any action as a reprisal against Internenor, Daphene Grassi, or any other persons who participated in this case.

10. Within forty-five (45) days of the date this Order becomes final, Respondent Gail Rucks shall send a copy of this decision to all tenants and employees of Country Manor.

11. Within ten fifty-five (55) days of the date this Order becomes final, Respondent Gail Rucks shall inform the Secretary of HUD and the Intervenor in writing of the steps taken to implement this Order and specifically state whether or not Foundation, Benedictine, and/or Brian Kelm have acted in any way to prevent Respondents from carrying out the terms of this Order.

This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) and 24 C.F.R. §§ 180.670 and 180.680(b), and will become the final agency decision thirty (30) days after the date of issuance of this initial decision unless further action is taken by the Secretary.

_____
WILLIAM C. CREGAR
Acting Chief Administrative Law Judge

Dated: September 20, 2001

CERTIFICATE OF SERVICE

I hereby certify that copies of this **INITIAL DETERMINATION AND ORDER** issued by WILLIAM C. CREGAR, Acting Chief Administrative Law Judge, in HUDALJ 05-98-1649-8, were sent to the following parties on this 20th day of September, 2001, in the manner indicated:

_____
Chief Docket Clerk

REGULAR MAIL:

Daphene Grassi
504 First St. N.E.
Apt. 221
Sartell, MN 56377

Karla Krueger, Esq.
St. Cloud Legal Services
830 W. Germain, Suite 300
P.O. Box 886
St. Cloud, MN 56302

Todd A. Kelm
Kelm Law Offices, P.A.
1287 2nd Street North, Suite 101
P.O. Box 368
Sauk Rapids, MN 56379

Country Manor Apartments
Hollis Helgeson,
520 First St. N.E.
Sartell, MN 56377

Country Manor Apartments
Gail Rucks, Agent
520 First St. N.E.
Sartell, MN 56377

Elizabeth Crowder, Esq.
U.S. Department of Housing
and Urban Development
77 West Jackson Boulevard Room 2633
Chicago, Illinois 60604-3507

INTEROFFICE MESSENGER:

Floyd May, Deputy Assistant Secretary
for Operations & Management, FHEO
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 5128
Washington, D.C. 20410

Joseph A. Pelletier, Attorney
Barbara J. Elkin, Attorney
Fair Housing Compliance Division
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 10270
Washington, D.C. 20410

Harry L. Carey, Associate General Counsel for Fair Housing
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 10270
Washington, D.C. 20410

Linda M. Cruciani, Assistant General Counsel for Fair Housing
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 10270
Washington, D.C. 20410